IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Court's order whether the case is or not approved for reporting

(Chapter VIII Rule 32(2) (b)

Description of Case.

W.P. No. 5356 (S/S) of 2001

(Old No. 28472/1997)

Date of decision :- 07-11-2006

A.F.R. (Approved for reporting)

~~Not approved for reporting~~

Date :- 07-11-2006 Initials of Judge

Note :- Bench Reader will attach this at the top of the first page of the judgment when it is put up before the Judge for signature.

HIGH COURT OF UTTARANCHAL, AT NAINITAL

Writ Petition No. 5356 (S/S) of 2001
(Old No. 28472/1997)

Kishan Singh Bisht
S/o Late Hukum Singh Bisht
R/o Forest Compound, Ram Nagar,
District – Nainital .....Petitioner

Versus

1. The State of U.P. through Secretary,
   Forest Department, Govt. of U.P., Lucknow
2. The Principal Chief Conservator of Forest,
   U.P., Lucknow
3. The Chief Conservator of Forest (Wild Life),
   U.P. Lucknow.
4. The Chief conservator of Forest, Western Circle,
   U.P. Nainital.
5. The Director, Corbett Tiger Reserve, U.P.,
   Ram Nagar, Nainital ...Respondents

Sri Ganesh Kandpal, holding brief of Sri B.D. Upadhyay-Advocate for the petitioner.
Sri N.P. Shah, learned standing counsel for the respondents/State

Per Hon'ble J.C.S. Rawat, J.

1. By means of this Writ Petition, moved under Article 226 of the Constitution of India, the petitioner has sought the following reliefs:-

> "i) To issue a writ, order or direction in the nature of Certiorari, to call for the record of the case and quash the impugned order dated 23.08.1997 passed by the respondent No. 5, contained in Annexure-I to this writ petition.
>
> ii) To issue a writ, order or direction in the nature of mandamus directing the respondents not to interfere with the peaceful working of the petitioner on the post of Junior Clerk in the office of respondent No.5 and pay salary for which he is entitled.
>
> iii) To issue any other suitable writ, order or direction which this Hon'ble Court may deem fit and proper in the circumstances of the case.
>
> AND
>
> To award the cost of the writ petition to the petitioner."

2. The petitioner was appointed as a Forest Guard in the year 1985 and he had been working as a Typist in the establishment. The petitioner had submitted application to the respondent No.5-The Director, Corbett Tiger Reserve, Ram Nagar, Nainital for his promotion on the post of Clerk. The said application was forwarded to the respondent No.4-Chief Conservator of Forest, Western Circle, Nainital. The respondent No. 4 specifically stated to the respondent No.5 that he had no knowledge about such Government orders by which the Forest Guards should be appointed as a clerk. The respondent No. 5 again communicated that in the past certain Forest Guards have been promoted as Clerk in the establishment. On such insistence of the respondent No. 5, the respondent No. 4 passed the order that the case of the petitioner regarding his promotion to the post of clerk may be initiated in accordance with the law. The petitioner was promoted on 31st May, 1997 as a Clerk in the establishment. The respondent No. 4 sent a letter to respondent No. 5 and in pursuance of the said letter, the respondent No. 5 cancelled the promotion order of the petitioner. The petitioner made representation before the authority concerned but no heed was paid. Feeling aggrieved by the impugned order, the petitioner has filed this writ petition before this court.

3. The counter affidavit had been filed by the respondents in which it had been pleaded that the appointment of the petitioner had been made under the U.P. Lower Subordinate Forest Service Rules, 1980 (hereinafter referred as Rules, 1980). The petitioner was appointed as Forest Guard under the Rules, 1980 and he is not entitled to be promoted in accordance with U.P. Subordinate Offices Ministerial Staff

(Direct Recruitment) Rules, 1985 (hereinafter referred as Rules, 1985). The said 1985 Rules are not applicable in the case of the petitioner. It was further pleaded that the petitioner was promoted against the rules, as such, his promotion order was cancelled. It was further pleaded in the counter affidavit that the petitioner is governed under the special rules and he is not covered under the Group "D" Employees Service (U.P.) Rules, 1985 (hereinafter referred as Group "D" Rules). It was further pleaded that there are separate rules for the promotion of the Forest Guards in the Forest Manuals as provided under Article 29-1-b (5) (c) wherein it is provided that 50% post of Forest Ranger would be filled up by promotion by forest Guard and 50% post would be filled up by direct recruitment. At last, it is pleaded that the petition be dismissed.

4. Heard Sri Ganesh Kandpal, holding brief of Sri B.D. Upadhyay-Advocate for the petitioner; Sri N.P. Shah, learned standing counsel for the respondents/State and perused the record.

5. Learned counsel for the petitioner contended that Rule 6 of Group 'D' Rules provides the procedure of the recruitment of Class 'C' employees in the clerical establishment. It was further contended that 50% of the vacancy in the particular office may be filled by promotion amongst Group 'D' employees eligible for being appointed in Class 'C' Group. It was further contended that the petitioner is also holding Group 'D' post, as such, he is entitled to be promoted under Group 'D' Rules. Learned Standing counsel refuted the contention. Perusal of Rule 6 of Group 'D' Rules clearly provides that these rules are applicable only for the

Ministerial staff in a subordinate office and Group ‘D’ employees who had been appointed as provided under the proviso of said Rules. It is only applicable to those Group ‘D’ employees who had been appointed in Group ‘D’ under Rule 6 of Group ‘D’ Rules. Rule 6 of Group ‘D’ Rules provides as under:-

6. ***Source of recruitment.-*** *The sources of recruitment to the various categories of Group ‘D’ posts shall be as follows:-*

“a) Peon, Manager, Chaukidar, Mali Farrash, Sweeper, Waterman/Bhisti, Tindal, thelaman, recordlifter and Every other non-technical post ….*By direct recruitment*

b)	*Peon-Jamader*	*By promotion from amongst permanent peons.*
C)	*Daftri/Book Binder/ Cyclostyle Operator*	*By promotion from amongst qualified peons, messenger & Farrashs*
d)	*Farrash Jamadar*	*By promotion from amongst Permanent Farrash*
e)	*Sweeper Jamadar*	*By promotion from amongst Permanent Sweeper*
f)	*Head Mali*	*By promotion from amongst Permanent Malis.*

Provided that where no eligible/suitable candidate is available for promotion to a particular post which is required to be filled by promotion, the post may be filled by direct recruitment.”

6. 1985 Rules clearly provide that the person who are members of the service of Group ‘D’ Rules, 1980 can be promoted in Class ‘C’. Thus, Forest Guards who had been appointed under the Rules, 1980 are not governed by the Group ‘D’ Rules, as such, the petitioner is not eligible to be promoted in Class ‘C’ under Rules, 1985.

7. In view of the above contention, the argument of the learned counsel for the State prevails and the contention of the learned counsel for the petitioner had no force.

8. Learned counsel for the petitioner had further contended that the impugned order canceling the promotion of the petitioner from the post of Forest Guard to the post of Junior Clerk cannot be passed without giving opportunity to the petitioner. Learned Standing counsel refuted the contentin and contended that the order was made against the Rules, as such, there was no need to provide the opportunity to the petitioner. The principle of natural justice are not rigid or immutable and hence they can not be imprisoned in a straight jacket. It must yield to change with exigencies of situations. It must be confined within its limits and can not be allowed to run wild. While interpreting legal provisions, a Court of law can not be unmindful of the hard realities of life. The approach of the Court in dealing with such cases should be pragmatic rather than pedantic, realistic rather than doctrinaire, functional rather than formal and practical rather than 'precedential'. In certain circumstances application of the principle of natural justice can be modified and even excluded.

9. In **Nazira Begum Lashkar and others Vs. State of Assam-(2000)5 S.L.R. page 777,** the appellants claimed to have been appointed as Assistant teachers of different Primary schools in the State of Assam in the year 1990 but those appointments were cancelled by the State Government. The said appointments had been made though no posts were available and the appointments had been made not in accordance with the prescribed procedure. The order of

cancellation had been assailed in the High Court by filing the writ petition. The Division Bench of the High Court sustained the order of the State Government and did not interfere with the order. In appeal, the Hon'ble Apex Court held that the Division Bench of the Gauhati High Court while hearing the petition issued a direction to the Government for holding an inquiry and submitting a report in view of the alleged gross mal-practices adopted in different states. After the inquiry it was revealed that the said appointments had not been in accordance with the statutory rules and without any advertisements calling for applications. The Division Bench of the Gauhati High Court held that the initial appointment being dubious in nature the issuance of appointments letter will not confer any right on the appointees. The Apex Court had held as under:-

> *"14. .....While the matter was pending before the Division Bench, the Court was persuaded to appoint any Inquiry Committee, in view of the allegations of gross irregularities and illegalities committed in the matter of appointment of teachers indifferent primary schools in different districts. The said Committee has gone into details and recorded findings that the provisions of the Recruitment Rules have not at all been followed. The High Court even has gone to the extent of recording a finding that there has been tampering of records and fabricating of documents. Since the appointments to the posts are governed by a set of statutory rules, and the prescribed procedure therein had not been followed and on the other hand appointments have been made indiscriminately, immediately after posts were allotted to different Districts at the behest of some unseen hands, such appointments would not confer any right on the appointee nor such appointee can claim even any equitable relief from any Court. That apart, the appointments stood annulled hardly after six months from the date of appointments and the appointees cannot claim to be continuing for an unusual long period, so as to claim a humanitarian consideration in their case. The decisions cited by Mr. Parikh, in support*

of his contention, not only do not support his contention but on the other hand appears to us to be against his contention. In Ashwani Kumar's case, 1997(2) SCC 1 this Court in no uncertain terms held that as the appointments had been made illegally and contrary to all recognized recruitment procedures and were highly arbitrary, the same were not binding on the State of Bihar. This Court further went on to hold in the aforesaid case that the initial appointments having been made contrary to the statutory rules, the continuance of such appointees must be held to be totally unauthorized and no right would accrue to the incumbent on that score. The Court had also held that it cannot be said that principles of natural justice were violated or full opportunity was not given to the employees concerned to have their say in the matter before their appointments were called and terminated. .... "

10. The Hon'ble Apex Court in **Pabitra Mohan Dash and others Vs State of Orissa and others- 2001 (1) S.L.R. page 43** has observed as under:

"It is not disputed that with effect from 29.5.1977 Regulation 17 in the Board of Secondary Education has been brought into force which makes it obligatory for every institution to have a Headmaster who must be a trained graduate and must have 7 years of teaching experience as a trained graduate teacher. If subsequent to 29.5.1977 any appointment has been made to the post of Head master contrary to the aforesaid provisions of the Regulation then the said appointment would be invalid appointment and would not confer any right on the appointee. The expression 'approval' used in the second direction in Golakh Chandra Mohanty's case is referable to the approval contemplated under Rule 8(2)(b) of the Recruitment Rule and, therefore, if there has been an approval by the Director then in such a case the appointment made after the prior approval would not be invalidated. In our considered opinion the conclusion of the Special Bench that an approval of the Inspector is no approval in the eye of law is the correct position, and as such, does not require any interference by this Court."

11. Division Bench of this court in **Special Appeal No. 94 of 2004 decided on 11th August, 2006, Jagat Singh Vs. Director of Educations and others** had taken a similar view and held that where the appointment of the petitioner is itself invalid that does not confer any right and title to the petitioner to be appointed and no right of hearing is available to the person concerned.

12. It is clear from the record that the petitioner was not entitled to be promoted and his promotion was made against the Rules, as such, no opportunity was required to be given to the petitioner before passing the order. It was further contended that certain others persons were appointed in the past, as such, the petitioner was also entitled to be retained in service. Learned Standing Counsel refuted the contention and contended that if any illegality has been committed in the past, it cannot be allowed to be perpetuated. The Apex Court has held at para 75 **in State of U.P. Vs. Neeraj Awasthi and others, (2006) 1 SCC p/667** as under:-

> *"The fact that all appointments have been made without following the procedure, or services of some persons appointed have been regularised in the past, in our opinion, cannot be said to be a normal mode which must receive the seal of the court. Past practice is not always the best practice. If illegality has been committed in the past, it is beyond comprehension as to how such illegality can be allowed to perpetuate. The State and the Board were bound to take steps in accordance with law. Even in this behalf Article 14 of the Constitution will have no application. Article 14 has a positive concept. No equality can be claimed in illegality is now well settled."*

In view of the above legal position, the petitioner is not entitled to be promoted to the post of Clerk.

13. In view of the foregoing discussion, the writ petition devoids of merit is liable to be dismissed and is dismissed accordingly. The parties shall bear their own costs.

14. All applications pending in this case are stand disposed of in terms of the judgment.

(J.C.S. Rawat, J.)

7th November, 2006
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